IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1258

HERBERT PHILLIP SCHLANGER,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Herbert Phillip Schlanger respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 11, 1978.[1]

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[1]In addition to the United States, the other defendants below and respondents here are various individual officers of the United States and of the United States Air Force: the Secretary of the Air Force; Hon. Robert C. Seamans, Jr., Secretary of the Air Force (1969-1973); the Chief of Staff, U. S. Air Force; General John D. Ryan, Chief of Staff, USAF (1969-1973); General John P. McConnell, Chief of Staff, USAF (1965-1969); Major General Ernest Pinson, USAF, Commandant, Air Force Institute of Technology (AFIT); Colonel Miles Palmer, USAF, Director, Civilian Institutions Divisions, AFIT; *(continued)*

OPINIONS BELOW

The order of the district court is unreported and is printed in Appendix B hereto, at page 1b. The opinion of the Court of Appeals has not been published and is printed in Appendix B at page 3b. The Order of the Court of Appeals denying rehearing is printed in Appendix B at page 14b.

JURISDICTION

The judgment of the Court of Appeals was entered on September 11, 1978. A timely petition for rehearing or rehearing *en banc* was denied on November 15, 1978. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

May an appeal be decided by a panel which does not have a quorum of judges who constitute the Court of Appeals?

(footnote continued from preceding page)
Colonel Homer Baker, Commander, Moody AFB, Georgia (1968-1971); Lt. Col. Thomas Sawyer, Commander, 57th Fighter Interceptor Squadron, Keflavik NS, Iceland (1971); Major John Halley, Assistant Professor of Aerospace Studies, Arizona State University (1968); Major Robert Eatinger, AFIT Liaison Officer, Arizona State University (1968); Captain James Miner, AFIT Team Chief, Arizona State University (1967-1968).

II

May a court grant relief to an ex-serviceman whose enlistment contract was breached by the military during his term of service, where that breach resulted in (1) his military career being destroyed; (2) his being held to service unlawfully for over three years; (3) his military records having included in them inaccurate, highly prejudicial statements; and (4) his being precluded ever from holding a commission under the United States?

STATUTES INVOLVED

The statutory provisions involved in resolution of Question I are 28 U.S.C. §43, 28 U.S.C. §1291 and 28 U.S.C. §1294. Those involved in resolution of Question II are 28 U.S.C. §1331; 5 U.S.C. §§701-704; and, 28 U.S.C. §1346. They are printed in Appendix A.

STATEMENT OF THE CASE

(This statement is taken verbatim from the Court of Appeals' opinion. Bracketed material has been inserted by petitioner.)

In December 1962, Herbert Schlanger enlisted in the United States Air Force (USAF) for a period of 4 years and began his service. In 1965, Schlanger applied for entrance into the Airman's Education and Commissioning Program (AECP), a USAF program providing [for carefully screened, career-minded airmen (R. 178)] undergraduate

education and officer training leading to an officer's commission. After the USAF accepted Schlanger into the AECP, it arranged his admission into and assigned him for AECP participation at Arizona State University (ASU). As part of the program, Schlanger received a discharge on December 8, 1966 and reenlisted [as required for participation in the AECP (Complaint, ¶ s 7-9, R.3,4; Ex.36, p.5, R.180)], on December 9, 1966, for a period of 6 years.

In January 1966, Schlanger enrolled in his courses at ASU under the auspices of the Air Force Institute of Technology (AFIT), projected, with his AFIT advisers, a graduation date of June 1968, and began his studies. During the fall of 1967, Schlanger became ill and received several grades of "incomplete" and had to revise his projected graduation date to August, 1968.

In early 1968, Schlanger became actively involved in an organization known as the Arizona State University Civil Rights Board. This group focused its efforts primarily, at that time, on correcting perceived racial discrimination in housing in that area and received considerable local publicity regarding its efforts during March of 1968.

On April 2, 1968, an AFIT liaison officer at ASU summoned Schlanger to appear before him at a "counselling" session. While USAF contends that the conference related to Schlanger's absences from his classes and failure to remove his incompletes, Schlanger contends that the officer denounced Schlanger's civil rights activities, told him such activities were inappropriate for an officer trainee, and informed him he was "getting in with bad groups." [Schlanger was threatened with removal from the AECP if he did not cease his civil rights activities. (Complaint ¶ 25, R.6)]

On June 14, 1968, by letter, Schlanger was notified of his removal from AECP for demonstrating a "lack of officer potential." Schlanger sought clarification of this removal and eventually was informed that his absences from classes were the key factor in demonstrating his lack of officer potential. USAF officers denied Schlanger's subsequent requests to see the Report of Inquiry which had been prepared on the matter and also denied his requests for a hearing.

Soon thereafter, USAF reassigned Schlanger to a post in Georgia [and demoted him two grades (Complaint ¶ 41, R.8)] and later sent him to a post in Iceland. Schlanger's requests for a [hearing, (R.152-155)] discharge or reinstatement in AECP were denied at all levels of USAF authority. Eventually, USAF permitted Schlanger to return to ASU to complete his undergraduate studies at his own expense. He did so in 1969 and then began litigation seeking his discharge. [See, e.g., *Schlanger v. Seamans*, 401 U.S. 487 (1971).] After various legal proceedings, the USAF, in [December, 1971], discharged Schlanger, about 6 months before the expiration of his scheduled term of service and about 1 week before a scheduled oral argument before the Court of Appeals for the District of Columbia Circuit.

Schlanger then filed the complaint which is the subject of this appeal. In this complaint, filed in the District of Arizona, Schlanger [made] six claims for relief: (1) his removal from the AECP violated various of his constitutional rights [and various USAF regulations]; (2) the defendants induced a breach of his reenlistment contract; (3) the defendants breached his reenlistment contract; (4) the defendants unlawfully detained, arrested, and restrained him in Arizona; (5) the defendants unlawfully detained, arrested, and

restrained him in Georgia; and (6) the defendants unlawfully detained, arrested, and restrained him in Iceland. The complaint names the United States, the Secretary of the Air Force, the Chief of Staff, and various officers of the USAF and AFIT as defendants.

* * *

On November 5, 1973, the District Court, Hon. Carl A. Muecke presiding, dismissed the complaint as *res judicata.* On January 5, 1975, however, this Court [of Appeals], in a brief, two-paragraph per curiam memorandum "remanded" the case to the District Court.

The District Court then, on March 12, 1976, granted the defendants' motion to dismiss the complaint. In his written order of dismissal, the District Court Judge . . . found that the complaint failed to state a claim because federal courts lack jurisdiction to review internal military matters. [On appeal, a panel consisting of Judge Trask, Senior Judge Kelkenny and District Judge Hauk stated that] "because we agree with the District Court that the complaint fails to state a claim upon which relief could be granted, we affirm the District Court on that basis . . . ."

REASONS FOR GRANTING THE WRIT

1. The panel which decided this case was improperly constituted.

The practice of permitting an appeal to be decided by a panel consisting of less than a quorum of judges who constitute the Court of Appeals raises serious questions of judicial administration and statutory construction. These

questions have not been, but should be, addressed and resolved by this Court.

An appellant has a right to appeal the judgment of a district court to the Court of Appeals for that circuit. 28 U.S.C. §§1291, 1294. The Court of Appeals "consist[s] of the circuit judges of the circuit in regular active service." 28 U.S.C. §43(b). It is not disputed that a district court judge or a senior judge is "also competent to sit" when properly designated or assigned, 28 U.S.C. §43(b). The question presented arises only when, as in this case, more than one judge of a three-judge panel is so designated or assigned. For instance, when circuit judges in regular active service are available, could a Court of Appeals order that an appeal be heard by three district judges sitting by designation? It is doubtful. Where, then, must the line be drawn? Petitioner submits that it is both rational and reasonable to require, consistent with the language and tenor of the statutes, that no panel of a Court of Appeals may have more than one judge who is not in regular active service. If this is true, then the judgment below was rendered by a panel improperly constituted and this case must be remanded to the Court of Appeals.

2. The decision below creates a conflict between the circuits.

The decision rendered in this case on September 11, 1978, creates a conflict between the circuits concerning standards to be applied in determining when courts may review of actions taken by military authorities. It is undisputed at this stage of litigation that Mr. Schlanger had his military career destroyed and his reenlistment contract breached by acts of

U.S. Air Force authorities. These acts were accomplished in violation of Air Force regulations, without prior notice or hearing and were purportedly based on information uncovered during a clandestine inquiry the report of which Mr. Schlanger was not permitted to see.

Mr. Schlanger has not asked the courts to substitute their judgment for that of the military as to whether Mr. Schlanger should properly have been permitted to become an officer. Mr. Schlanger asks only a review of the procedure employed in reaching and implementing that determination to see whether those procedures comport with due process requirements and whether they were conducted in accordance with applicable regulations. *These* a court may properly review.

The decision of the panel below puts the Ninth Circuit squarely in conflict with the Fifth Circuit on this issue. The Fifth Circuit, in its well-reasoned, analytical opinion in *Mindes v. Seamans,* 435 F.2d 197 (5 Cir. 1971), set forth a four-factor balancing test to be applied in deciding whether to review an internal military decision: (1) the nature and strength of the plaintiff's challenge to the military decision; (2) the potential injury to the plaintiff is review is refused; (3) the type and degree of anticipated interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved. 453 F.2d at 201.

The panel in this case, after stating the *Mindes* criteria, ignored the approach taken by the Fifth Circuit and flatly held that, in the Ninth Circuit, courts should not and *are without jurisdiction* to review that of which Mr. Schlanger complains.[2] Thus the Ninth Circuit has adopted a

[2]The panel first concluded, without benefit of any factual findings that Mr. Schlanger's injury was *de minimus* and that, therefore, *one* of the four factors was weighted against review. It rested its decision, however,

(continued)

formalistic, restrictive view of the scope of review, whereas the Fifth Circuit has adopted a rational, analytical approach. These views cannot be reconciled except by this Court.

3. The panel improperly made findings of fact.

This case calls for the exercise by this Court of its supervisory powers over the Court of Appeals. The panel which decided this case made findings of fact in order to support its decision.[3] A Court of Appeals may *not* make independent findings of fact, particularly when those findings are devoid of support in the record and *especially* when it is construing a complaint to determine whether it states a claim upon which relief can be granted. This Court should grant certiorari to correct this clearly erroneous exercise of power by the Court of Appeals and to insure that the lower Court confine itself to the proper exercise of its jurisdiction.

4. This case involves a principle of public importance.

This case involves an issue of substantial public importance which needs to be addressed by this Court. There is no longer a military draft in the United States. All members of the armed forces now serve under contracts of enlistment.

(footnote continued from preceding page)

on *"a simpler and perhaps sounder"* line of cases in the Ninth Circuit. Appendix B, page 11b. It never undertook the examination and balancing which the Fifth Circuit requires.

[3]"[T]his plaintiff's alleged injury . . . is indeed so slight as to be negligible. . ." and "the military decision to remove him from the AECP does not subject him to consequences as serious as those to which the plaintiff in *Denton* was allegedly subject." Appendix B at pages 11b and 13b.

The decision of the Ninth Circuit in this case allows the military to promise an enlistee anything and then, once the enlistee takes his oath, renege without fear of judicial intevention, review or correction.[4] It is, therefore, desirable for this Court to undertake a definition of the duties and obligations of the military under a contract of enlistment.

Is it true, as the Attorney General opined, that "[e]nlistments into the Army made under the inducements held out by the laws of the United States are contracts and although the government be a party, still the contracts ought to be construed according to those well-established principles which regulate contracts geneally," 6 Op. Att. Gen. 187? If not, by what standards is such a contract judged? With over 1,000,000 of these contracts in force, many entered into as a result of offered inducements, a pronouncement on the subject by this Court would be timely.

This case is one well-suited for such a determination since, in its present posture, it stands uncontroverted that: (1) Mr. Schlanger's reenlistment was predicated upon his participation in and was undertaken as part of and in reliance upon his entrance into the AECP; (2) he was removed from the AECP in violation of USAF regulations and in violation of his right to due process; (3) that the removal (if in fact improper) constituted a material breach of his reenlistment contract; and (4) that he was, as a result of his removal, demoted and held to service for over three additional years in an enlisted status. Such a factually "clean" record permits this Court to speak directly to this important issue.

[4]The Ninth Circuit, faced with the uncontroverted allegation that the enlistment contract had been breached, never addressed the issue of contractual relations. It held, *sub silentio*, that rights and duties under enlistment contracts may not be enforced by the enlistee in court.

CONCLUSION

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

February 1979

APPENDIX A

STATUTES

28 U.S.C. §43. Creation and composition of courts

(a) There shall be in each circuit a court of appeals, which shall be a court of record, known as the United States Court of Appeals for the circuit.

(b) Each court of appeals shall consist of the circuit judges of the circuit in regular active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court.

28 U.S.C. §1291. Final decisions of district courts

The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. §1294. Circuits in which decisions reviewable

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

(2) From the United States District Court for the District of the Canal Zone, to the Court of Appeals for the Fifth Circuit;

(3) From the District Court of the Virgin Islands, to the Court of Appeals for the Third Circuit;

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

5 U.S.C. §701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. §702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. §703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought

against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. §704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

28 U.S.C. §1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjuded to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. §1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collecte dunder the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District

Court for the District of the Canal Zone and the District Court of the virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

APPENDIX B

OPINIONS BELOW

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

March 11, 1976

HERBERT PHILLIP SCHLANGER, No. CIV 73-448
PLAINTIFF,
vs. PHX - CAM
U.S.A., et al., ORDER
DEFENDANT.

IT IS HEREBY ORDERED

that this Court, having received the order remanding the case from the Ninth Circuit Court of Appeals (said order being No. 74-1232, and filed with the Ninth Circuit Court of Appeals on July 7, 1975) and this Court having also received the benefit by additional briefing by the parties, and having considered the record of the plaintiff's proceedings before the District Court and the Court of Appeals for the District of Columbia, finds that:

(1) The matter herein considered is *res judicata* by virtue of the dismissal of plaintiff's case by the United States District Court for the District of Columbia in H.C. 39-71 (see Exhibit 2 to Document No. 27). From a review of the pleadings, especially plaintiff's Motion for Summary Reversal filed with the Court of Appeals for the District of

Columbia on July 26, 1971, and the Government's response thereto filed with that same Court on July 29, 1971, it is clear that the only issues before that court were the contractual claim now made by plaintiff in this Court and this is likewise true with respect to the issue relating to the power of the Court to grant the relief sought. See Schlanger's Motion for Summary Reversal at page 1, and the Government's response thereto at page 3.

For the above stated reasons and for those reasons set forth by defendants in their papers, this Court finds that defendants' Motion to Dismiss should be and is hereby granted.

(2) This Court further finds that plaintiff fails to state a claim for which relief can be granted. Having considered those factors that the court in ***Mindes v. Seaman,*** 453 F.2d 197 (5th Cir. 1971), held should be considered where a district court examines allegations "in light of the policy reasons behind nonreview of military matters," this Court finds that those factors in this case militate against a finding of reviewability. See also ***Arnheiter v. Chafee,*** 435 F.2d 691 (9th Cir. 1970).

/s/ C. A. Muecke
C. A. Muecke
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Herbert Phillip Schlanger, Plaintiff-Appellant,	)	No. 76-1930
v.	)	OPINION
United States of America, et al., Defendants-Appellees,	)	

On Appeal from the United States District Court
for the District of Arizona

Before: KILKENNY, Senior Circuit Judge, TRASK, Circuit Judge, and HAUK, District Judge*

HAUK, District Judge:

I. BACKGROUND

This is an appeal from an order of the District Court for the District of Arizona, Hon. Carl A. Muecke, dismissing

*Hon. A. Andrew Hauk, United States District Judge for the Central District of California, sitting by designation.

plaintiff-appellant Schlanger's complaint on the grounds of *res judicata* and failure to state a claim upon which relief could be granted.

II. STATEMENT OF FACTS

In December 1962, Herbert Schlanger enlisted in the United States Air Force (USAF) for a period of 4 years and began his service. In 1965, Schlanger applied for entrance into the Airman's Education and Commissioning Program (AECP), a USAF program providing undergraduate education and officer training leading to an officer's commission. After the USAF accepted Schlanger into the AECP, it arranged his admission into and assigned him for AECP participation at Arizona State University (ASU). As part of the program, Schlanger received a discharge on December 8, 1966 and reenlisted, on December 9, 1966, for a period of 6 years.

In January 1966, Schlanger enrolled in his courses at ASU under the auspices of the Air Force Institute of Technology (AFIT), projected, with his AFIT advisers, a graduation date of June 1968, and began his studies. During the fall of 1967, Schlanger became ill and received several grades of "incomplete" and had to revise his projected graduation date to August 1968.

In early 1968, Schlanger became actively involved in an organization known as the Arizona State University Civil Rights Board. This group focused its efforts primarily, at that time, on correcting perceived racial discrimination in housing in that area and received considerable local publicity regarding its efforts during March of 1968.

On April 2, 1968, an AFIT liason officer at ASU summoned Schlanger to appear before him at a "counselling" session. While USAF contends that the conference related to Schlanger's absences from his classes and failure to remove his incompletes, Schlanger contends that the officer denounced Schlanger's civil rights activities, told him such activities were inappropriate for an officer trainee, and informed him he was "getting in with bad groups."

On June 17, 1968, by letter, Schlanger was notified of his removal from AECP for demonstrating a "lack of officer potential." Schlanger sought clarification of this removal and eventually was informed that his absences from classes were the key factor in demonstrating his lack of officer potential. USAF officers denied Schlanger's subsequent requests to see the Report of Inquiry which had been prepared on the matter and also denied his requests for a hearing.

Soon thereafter, USAF reassigned Schlanger to a post in Georgia and later send him to a post in Iceland. Schlanger's requests for a discharge or reinstatement in AECP were denied at all levels of USAF authority. Eventually, USAF permitted Schlanger to return to ASU to complete his undergraduate studies at his own expense. He did so in 1969 and then began litigation seeking his discharge. After various legal proceedings, the USAF, in February 1972, discharged Schlanger, about 6 months before the expiration of his scheduled term of service and about 1 week before a scheduled oral argument before the Court of Appeals for the District of Columbia Circuit.

Schlanger, who has represented himself throughout his various actions, attended law school after his discharge and is now a member of the Arizona bar. He continues to argue his own case here.

III. SUMMARY OF PRIOR LITIGATION

A. First Arizona Action

On August 27, 1969, Schlanger filed a petition for a writ of habeas corpus in the District Court for the District of Arizona seeking his discharge from USAF. The District Court denied the petition and this Court remanded the case. The District Court again denied the petition and this Court then affirmed the dismissal. The Supreme Court granted certiorari, 400 U.S. 865 (1970), and affirmed, Schlanger v. Seamans, 401 U.S. 487 (1971). In an opinion written by Justice Douglas, the Court found that the District Court in Arizona lacked jurisdiction over the defendants—the Secretary of the Air Force, the Commander of the USAF base in Georgia, and the Commander of the USAF ROTC program at ASU—because the Secretary of the USAF and the base commander were not residents of Arizona and not amenable to process there and because the ROTC Commander was not in the chain of command above Schlanger. 401 U.S. at 488-90. The Court expressly reserved the question of whether habeas corpus would be an appropriate remedy if, as Schlanger claimed, the USAF had breached his contract of reenlistment. *Id.* at 492.

B. Georgia Action

Schlanger then filed a habeas corpus action in the Middle District of Georgia, where he was then officially stationed, on July 9, 1970. The District Court there in Georgia dismissed the petition for Schlanger's failure to exhaust his intraservice administrative remedies and the Court of Appeals for the fifth Circuit dismissed Schlanger's appeal.

C. District of Columbia Action

On April 28, 1971, Schlanger filed a petition for a writ of habeas corpus in the District Court for the District of Columbia. In the petition, Schlanger complained that his removal from the AECP violated due process; was arbitrary, capricious, and unreasonable; violated USAF regulations; was without factual basis; violated his first amendment rights; and breached his reenlistment contract. The petition named the Secretary of the Air Force, its Chief of Staff, and four other USAF officers as respondents. The petition also sought, in the alternative to habeas corpus relief, a writ of mandamus, a declaratory judgment of the parties' rights and duties under the contract of reenlistment, and relief for breach of contract.

The District Court in the District of Columbia issued an order to the respondents, ordering them to show cause why the petition should not be granted. The respondents answered the order to show cause by arguing that the reenlistment contract did not obligate the USAF to place Schlanger in any particular duty assignment; that Schlanger's instructors had reported his absences from scheduled classes; that Schlanger's failure to attend all scheduled classes was, under applicable regulations, a proper ground for removal from the AECP; and that the investigation and removal procedures followed the relevant USAF regulations. On July 8, 1971, the District Court dismissed the petition and, after the District Court Judge also denied a motion for reconsideration, Schlanger then appealed.

On February 24, 1972, the Court of Appeals for the District of Columbia Circuit, in a per curiam memorandum, dismissed the appeal as moot in light of the fact that the

USAF had discharged Schlanger. The discharge occurred about 1 week before a scheduled oral argument before that Court of Appeals and about 6 months prior to the expiration of Schlanger's 6-year term of service. Schlanger petitioned the Supreme Court for a writ of certiorari, which that Court denied on October 19, 1972. Schlanger v. Seamans, 409 U.S. 860 (1972).

D. Second Arizona Action

Schlanger then, on July 18, 1973, filed the complaint which is the subject of this appeal. In this complaint, filed in the District of Arizona, Schlanger makes six claims for relief: (1) his removal from the AECP violated various of his constitutional rights; (2) the defendants induced a breach of his reenlistment contract; (3) the defendants breached his reenlistment contract; (4) the defendants unlawfully detained, arrested, and restrained him in Arizona; (5) the defendants unlawfully detained, arrested, and restrained him in Georgia; and (6) the defendants unlawfully detained, arrested, and restrained him in Iceland. The complaint names the United States, the Secretary of the Air Force, the Chief of Staff, and various officers of the USAF and AFIT as defendants. Schlanger's complaint asserts several bases of jurisdiction, including the Declaratory Judgment Act, 28 U.S.C. §§2201, 2202; the Administrative Procedure Act, 5 U.S.C. §701 *et seq.*; the mandamus statute, 28 U.S.C. §1361; the Civil Rights Act, 28 U.S.C. §1343; the Federal tort Claims Act, 28 U.S.C. §1346; existence of a federal question, 28 U.S.C. §1331; and 28 U.S.C. §1357. In his prayer for relief, Schlanger seeks a declaratory judgment that his removal from AECP was unlawful for various reasons and that the removal from AECP breached his reenlistment

contract; expungement of the reference to the removal from his USAF records; $300,000 damages for breach of contract; and $1,000 per each day of alleged unlawful detention.

On November 5, 1973, the District Court, Hon. Carl A. Muecke presiding, dismissed the complaint as *res judicata*. On January 5, 1975, however, this Court, in a brief, two-paragraph per curiam memorandum "remanded" the case to the District Court. In its memorandum, the Court "suggested" that the parties brief the District Court on the basis of its jurisdiction and also suggested that the parties present a full record of the District of Columbia proceedings to the District Court.

On remand, the defendants did present a copy of the proceedings in the District of Columbia, including the government's response to the order to show cause, to the District Court. The District Court then, on March 12, 1976, granted the defendants' motion to dismiss the complaint. In his written order of dismissal, the District Court Judge stated two reasons for the dismissal. First, he found that the only issue before the court—plaintiff's contractual claim—had already been decided by the District of Columbia courts and principles of *res judicata* therefore barred this action. Second, he found that the complaint failed to state a claim because federal courts lack jurisdiction to review internal military matters. On April 5, 1976, the District Judge denied a Rule 59 motion to alter the judgment. This appeal followed.

IV. ISSUES ON APPEAL

On appeal, Schlanger challenges both reasons stated in the District Court's order of dismissal. Thus, he raises two issues on appeal:

(1) Does the doctrine of *res judicata* bar this action?
(2) Does the complaint state a claim upon which relief could be granted?

Because we agree with the District Court that the complaint fails to state a claim upon which relief could be granted, we affirm the District Court on that basis and find it unnecessary to reach the *res judicata* issue.

V. DISCUSSION

The District Court's order dismissing the complaint specified that the complain failed to state a claim because the complaint raised nonreviewable internal military matters. The District Court based this finding on the concept that the federal courts should hesitate to review internal military affairs and relied primarily upon a decision of the Fifth Circuit, Mindes v. Seamans, 453 F.2d 197 (5th Cir. 1971).

In Mindes v. Seamans, 453 F.2d 197 (5th Cir. 1971), the Court of Appeals for the Fifth Circuit considered the question of the scope of review a federal court should use in reviewing military matters. After reviewing precedent in the area, the court set forth a two-part test for the exercise of jurisdiction by federal courts over military affairs. *First,* the plaintiff must allege either the deprivation of a constitutional right or the violation of applicable statutes or regulations and then allege exhaustion of available intraservice remedies. 453 F.2d at 201. *Second,* a district court faced with allegations satisfying the first part of the test must then examine and balance the following four factors to determine whether, as a policy matter, review of the military decision in

question is proper. These factors are: (1) the nature and strength of the plaintiff's challenge to the military decision; (2) the potential injury to the plaintiff if review is refused; (3) the type and degree of anticipated interference with the military function; and (4) the extent to which the exercise of military expertise or discretion is involved. *Id.*

The plaintiff's allegations meet the *first* part of the *Mindes* test. The District Court's order in this case states, however, that, after considering the four factors in the *second* part of the test, "this Court finds that those factors in this case militate against a finding of reviewability." The District Court's decision on this point is correct because this plaintiff's alleged injury, when compared, for example, to a decision to send a member of the armed forces into combat duty, or a decision to discharge a soldier dishonorably, is indeed so slight as to be negligible, while the discretion the military should possess in deciding whom to select for officers should be unfettered. Nevertheless, we suggest that there is a simpler and perhaps sounder manner of handling this issue by considering it in the light of recent decisions of this Circuit.

In several decisions, all in the last eight years, this Court has discussed the reviewability of military decisions. In these cases, this Court has specifically held that, while the U.S. judiciary may review armed forces' orders of discharge, Denton v. Secretary of the Air Force, 483 F.2d 21, 24 (9th Cir. 1973), *cert. denied,* 414 U.S. 1146 (1974), federal courts should not review internal military decisions such as duty orders or duty assignments. Covington v. Anderson, 487 F.2d 660, 664-65 (9th Cir. 1973); Denton, *supra,* at 24; Arnheiter v. Chafee, 435 F.2d 691 (9th Cir. 1970) (per curiam). *See also* Correa v. Clayton, 563 F.2d 396, 399 (9th Cir. 1977).

In the seminal case in this Circuit, Arnheiter v. Chafee, *supra*, a Navy officer sought review of an order relieving him from command of a destroyer. The District Court, finding that the Navy's decision was internal, conformed to the Navy's regulations, and fell within the bounds of due process, granted a judgment of dismissal. Arnheiter v. Ignatius, 292 F. Supp. 811 (N.D. Cal. 1968). This Court then affirmed "so much of the district court's opinion as holds that the federal courts have no jurisdiction." 435 F.2d at 692. In its opinion, the Court quoted a famous passage from the Supreme Court decision of Orloff v. Willoughby, 345 U.S. 83, 93 (1953) ("judges are not given the task of running the Army. . . .").

Although refining it slightly, the later cases in this Circuit continue to affirm the *Arnheiter* rule. In *Denton, supra,* a former USAF captain sought a declaratory judgment that his general discharge was unlawful and the District Court granted summary judgment against him. This Court reaffirmed *Arnheiter* but distinguished it on the ground that the plaintiff in that case merely sought review of a duty order while the plaintiff in *Denton* sought a review of a discharge, which involved allegations of a much greater deprivation of the plaintiff's rights. The Court then proceeded to assume jurisdiction and review the problem of whether the USAF followed its own regulations in discharging Denton. Finding that it did so, the Court affirmed.

In *Covington v. Anderson, supra,* our Court's latest opinion in this area, the plaintiff sought review of his suspension from flight status as a jet pilot with the Oregon Air National Guard. The District Court granted summary judgment for the defendants and this Court affirmed, reaffirming *Arnheiter,* quoting again from the Supreme

Court language of *Orloff v. Willoughby,* and concluding that the matter should not be subject to judicial review. The opinion relied heavily upon the following language from the *Orloff* case:

> The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully induced and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.

487 F.2d at 665, *quoting* Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

In this case, plaintiff-appellant Schlanger seeks review of a decision of the USAF to remove him from the AECP and reassign him elsewhere. This military decision resembles the military decisions in *Arhneiter* and *Covington* in that it essentially involves a duty assignment. It does not fall within the scope of the *Denton* case because, while Schlanger may suffer certain collateral consequences from having the removal remain in his USAF record, the military decision to remove him from the AECP does not subject him to consequences as serious as those to which the plaintiff in *Denton* was allegedly subject. Therefore, we find that the USAF decision to remove Schlanger from the AECP was an internal military decision regarding a duty order not subject to judicial review in the federal courts.

Accordingly, the order of the District Court dismissing the complaint is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERBERT PHILLIP SCHLANGER,	)	
	)	
Plaintiff-Appellant,	)	No. 76-1930
	)	
v.	)	
	)	ORDER
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
	)	
Defendant-Appellees.	)	
	)	
	)	

Before: Kilkenny, Senior Circuit Judge, Trask, Circuit Judge, and Hauk, District Judge*

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Trask voted to reject the suggestion for a rehearing in banc, and Judges Kilkenny and Hauk have voted to recommend rejection of the suggestion for rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

*The Honorable A. Andrew Hauk, United States District Judge Central District of California, sitting by designation.

In this connection we note that the facts of the *Glines v. Wade* case, ____ F.2d ____, decided October 5, 1978, are entirely different from those herein in *Schlanger* and the only thing the two cases have in common is the military uniform.

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

Dated: November 13, 1978